No. 92-6073

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD LYLE AUSTIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eighth Amendment's guarantee that "excessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted" is applicable to a civil forfeiture imposed on a defendant convicted of the crime of sale of cocaine, as a consequence of that crime.

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. The ACLU has long worked to protect the rights of criminal defendants, and in particular to secure the constitutional right not to be subjected to cruel and unusual punishment. Toward that end, the ACLU has filed many briefs in this Court, as counsel for a litigant or as *amicus curiae*, in cases involving the interpretation of the Eighth Amendment.

STATEMENT OF THE CASE

On June 13, 1990, Keith Engebretson came to an auto body shop in Garretson, South Dakota, owned by the petitioner Richard Lyle Austin. Austin provided Engebretson with two grams of cocaine, which he apparently retrieved from his nearby trailer or mobile home.[2] The next day, the police searched the body shop and trailer, recovering small amounts of cocaine and marijuana, less than $4000 in cash, some drug paraphernalia, and a .22 caliber pistol. For this transgression, Austin was arrested, pled guilty in state court to one count of possession of cocaine with intent to distribute and, on January 28, 1991, was sentenced to seven years'

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] The consideration, if any, received by Austin in exchange for the cocaine is disputed. The affidavit attached to the government's motion for summary judgment alleges that the cocaine was exchanged "for an unknown amount of money." Cert.Pet. at 5. Austin contended that he received no money from Engebretson. *Id.* at 6.

imprisonment.[3]

This severe sentence, however, was not the end of Austin's punishment. In addition, the United States Attorney filed this civil forfeiture action seeking to forfeit to the United States the auto body shop in which Austin had worked for some 25 years, and the trailer, which constituted Austin's only residence. On April 8, 1991, the district court granted the government's motion for summary judgment. Austin was thus deprived of the business and home to which he had hoped to return after prison.

On appeal to the United States Court of Appeals for the Eighth Circuit, Austin contended that the forfeiture of his home and of his sole means of earning a legitimate income, on the facts of this case, violated the Eighth Amendment. The court of appeals did not address whether the forfeiture of virtually all of Austin's property was a disproportionate punishment for the sale of two grams of cocaine, thus constituting "cruel and unusual punishment," or an "excessive fine." Rather, the court "reluctantly" concluded that it did not matter whether the punishment was cruel, unusual and excessive. Austin was entitled to no relief, the court held, because civil forfeiture proceedings are exempt from the requirements of the Amendment. *United States v. One Parcel of Property*, 964 F.2d 814, 817 (8th Cir. 1992).

The court of appeals recognized that "the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284 (1983), and that as a modicum of fairness,

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[3] By contrast, under the federal sentencing guidelines, distribution of less than 25 grams of cocaine would be a level 12 offense; with a two-level reduction for acceptance of responsibility, the guideline sentence would be 6-12 months imprisonment, with eligibility for probation subject to conditions of confinement including house arrest. *See* Sentencing Guidelines §§2D1.1(c)(16), 3E1.1.

the principle of proportionality should be applied in civil actions that result in harsh penalties." 964 F.2d at 817. Nevertheless, it felt constrained by precedent to hold that a violation of this fundamental principle of fairness would not offend the Constitution if it occurred in a civil forfeiture proceeding, rather than in a criminal case.

SUMMARY OF ARGUMENT

The Cruel and Unusual Punishments and Excessive Fines Clauses of the Eighth Amendment apply to the infliction of punishment by government officials charged with enforcing the criminal laws. In any ordinary meaning of the term, the forfeiture of petitioner's home and business as a consequence of his violation of the criminal narcotics laws clearly operates as a punishment or fine. Petitioner has suffered a severe financial penalty that operates to impose retribution for his offense, to deter him and others from similar conduct in the future, and to incapacitate him from committing such crimes (as least by utilizing the same property) again. Undoubtedly, such forfeitures are experienced as punishment by those on whom they are inflicted.

Moreover, the narcotics forfeiture program is intended by Congress, and administered by the Department of Justice, for punitive purposes. The legislative history of recent congressional forfeiture provisions demonstrates that Congress thinks of civil and criminal forfeitures interchangeably, as penalties designed primarily to deter potential offenders, and to incapacitate offenders from future violations by stripping them of the instrumentalities of crime. Thus, such forfeitures should be considered punishment to which the Eighth Amendment applies by its plain terms.

The fact that the forfeiture in this case was imposed in a civil proceeding does not exempt it from the provisions of the Eighth Amendment. This Court's cases

make clear that "punishment" may be imposed in either a civil or a criminal proceeding, and that the test for whether a civil sanction is "punitive" or "remedial" is functional. *United States v. Halper*, 490 U.S. 435 (1989). Unlike cases involving corporal punishment of school children, *Ingraham v. Wright*, 430 U.S. 651 (1977), or the imposition of punitive damages in civil cases, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), narcotics forfeitures such as the one in this case involve the same purposes and the same danger of abuse of the government's prosecutorial power that motivated the framers to adopt the Eighth Amendment.

Nor is the Amendment inapplicable because the forfeiture in this case was *in rem*. This Court has long recognized that forfeiture proceedings, "though they may be civil in form, are in their nature criminal," *Boyd v. United States*, 116 U.S. 616, 634 (1886), and that *in rem* narcotics forfeitures in particular "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974). The historical distinction between *in personam* and *in rem* forfeitures is based primarily on the anachronistic fiction that the property itself is guilty of the offense. But "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Since the true purpose and effect of the narcotics forfeiture statute is primarily punitive, the form of the action cannot defeat the limitations on government power created by the Constitution.

Nothing in the precedents of this Court is inconsistent with holding the Eighth Amendment applicable to this case. Although the Court has upheld civil *in rem* forfeitures against a variety of constitutional attacks, *see,*

e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, it has never considered the application of the Eighth Amendment. Petitioner does not argue that such forfeitures are intrinsically unconstitutional, only that the extent of the permissible forfeiture must be proportionate to the seriousness of the offense and the blameworthiness of the offender.

This Court should hold that the court below erred in refusing even to consider the merits of petitioner's Eighth Amendment challenge, and remand the case to provide the court of appeals with an opportunity to consider that challenge now. The important constitutional question in this case is whether the Eighth Amendment applies in civil forfeiture proceedings. The proper application of the Eighth Amendment to the facts of this case turns on legal and factual inquiries that have never been addressed by the court below. This Court should adhere to its normal practice and decline to consider those particularized issues until they have been considered by the lower court in the first instance. *See, e.g., Yee v. City of Escondido*, __ U.S. __, 112 S.Ct. 1522, 1534 (1992).

ARGUMENT

I. THE CONSTITUTION DOES NOT PERMIT CRUEL AND UNUSUAL PUNISHMENTS TO BE INFLICTED, OR EXCESSIVE FINES TO BE IMPOSED, REGARDLESS OF THE LABEL APPLIED TO THE PROCEEDING IN WHICH THE PUNISHMENT IS IMPOSED

As this Court has recognized by granting *certiorari*, the decision of the court below presents a question of profound significance. The court did not hold that the forfeiture imposed on Austin was not constitutionally disproportionate to his offense, or even that proportionality was not properly a part of the inquiry mandated by the Eighth Amendment's prohibitions of "cruel and unusual

punishments" or "excessive fines." Rather, the court held that the entire question of the cruel or excessive character of the punishment inflicted on Austin was a matter of no concern to the Constitution, because the Eighth Amendment is altogether inapplicable to a proceeding labeled "civil forfeiture." The question before this Court is thus whether fundamental provisions of the Bill of Rights can be defeated by the simple expedient of labeling the punishment "civil" or "*in rem*."

A. Austin Was Punished By The Forfeiture In This Case

In any ordinary meaning of the term, the forfeiture of Austin's home and business as a result of his criminal activity was a "punishment" and a "fine." The primary dictionary definition of "punish" is "to impose a penalty on for a fault, offense, or violation," and a "punishment" is "a penalty inflicted on an offender through judicial procedure." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 955 (1985). A "fine" is "a sum imposed as punishment for an offense," or "a forfeiture or penalty paid to an injured party in a civil action." *Id.* at 464.

There is no question that this is precisely what happened to Austin. Forfeitures under 21 U.S.C. §881 all depend on a "violation" of the laws providing criminal punishment for possession and distribution of controlled substances. 21 U.S.C. §881(a)(1).[4] Austin's property was taken from him by the government in this action precisely because he violated the criminal laws against selling cocaine.

Just as there is no doubt that the imposition of forfeiture in this case is "experienced as a punishment by

[4] Each subsection of §881, specifically including those cited in the complaint in this case, either repeats this language or incorporates by reference another subsection that does.

[the person] upon whom it is imposed,"[5] there is no doubt that the narcotics forfeiture statute is specifically intended, in significant part, to impose punishment on drug dealers and on those who facilitate their operations. In enacting the Comprehensive Forfeiture Act of 1984,[6] which added criminal forfeiture provisions and expanded the scope of civil forfeiture under §881,[7] Congress specifically intended "to enhance the use of forfeiture . . . as *a law enforcement tool* in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep.No. 98-225, 98th Cong., 2d Sess. at 191, *reprinted in* 4 U.S. Code Cong. & Admin. News 3374 (1984)(emphasis added). Congress had "hoped that through the use of [then] current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering," *Id.* at 3377, but expressed "disappointment" with the fact that "the Federal Government's record in taking the profit out of organized crime, especially drug trafficking, was far below Congress' expectations." *Id.*

The Senate Report makes clear that Congress made little or no distinction between the purposes of the criminal and civil forfeiture procedures. "Forfeiture" is referred to generally as "the mechanism" for "an attack on the economic aspects" of narcotics crimes, *id.* at 3374, and civil and criminal forfeiture proceedings are described in turn as alternative measures to accomplish the

[5] Note, "Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process," 45 U. Miami L.Rev. 911, 946 n.165 (1991).

[6] The Comprehensive Forfeiture Act constitutes Chapter III of the Comprehensive Crime Control Act of 1984, Pub. L.No. 98-473 (1984).

[7] One of the specific provisions that permits the forfeiture in this case, §881(a)(7)(authorizing forfeiture of real property), was added by the Comprehensive Forfeiture Act.

same goals. *Id.* at 3376-80. Indeed, the Report makes clear that the criminal forfeiture provisions of 21 U.S.C. §853, which are indisputably a portion of the punishment imposed for crime, were adopted specifically to provide an alternative means of accomplishing the same punitive purposes that Congress attributed to the civil narcotics forfeiture provisions. *Id.* at 3379-80. Backlogs in civil court calendars and the efficiency of consolidating forfeiture actions with their underlying criminal cases, particularly in multidistrict cases, were cited as reasons for permitting broader use of criminal forfeitures, despite the fact that, in other respects, "civil forfeiture has advantages over criminal forfeiture." *Id.* Indeed, the very provision that permits forfeiture of the Austin's real property, §881(a)(7), was added to the law specifically because "the prospect of the forfeiture of the property would [be] a powerful deterrent" to criminal activity -- the classic purpose of criminal punishment. *Id.* at 3378. This point was highlighted by Senator Biden, a principal supporter of the bill that became the Comprehensive Forfeiture Act, who emphasized that a primary purpose of forfeiture, whether civil or criminal, is "to punish [narcotics] defendants where it hurts the most -- their wallets." 128 Cong. Rec. 26577 (Sept. 30, 1982).[8]

As this Court has held, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment . . . ." *United States v. Halper*, 490 U.S. at 448 (emphasis added). The legislative history thus explodes any notion that civil forfeiture in narcotics cases is intended solely for purposes

[8] Another leading supporter of the Comprehensive Forfeiture Act, Representative Sawyer, speaking specifically about civil forfeiture, told the House of Representatives: "Recognition that the drug trade will not be affected unless the profit is removed from the crime has led to the development of forfeiture as a form of penalty." 130 Cong. Rec. 24,801 (Sept. 11, 1984).

radically distinct from those motivating punitive criminal sanctions.

Forfeiture of the property of drug dealers is a punishment. It is so understood by those who are its objects and by the federal prosecutors who administer it. It was so intended by the Congress that has created the modern civil forfeiture laws. Under any plain reading of the Eighth Amendment, it must therefore not be "cruel and unusual" nor, as a financial punishment or fine, "excessive." Accordingly, the government's effort to exclude forfeiture from the reach of the Amendment must rest on a claim that some unexpressed limitation on the reach of the Amendment somehow excludes civil forfeitures notwithstanding their punitive purpose and effect. As we demonstrate below, no such limitation exists.

B. The Eighth Amendment Is Not Inapplicable Simply Because A Forfeiture Is Imposed In A Civil Proceeding

This Court has never attached preclusive importance to the label attached to a particular form of action, correctly acknowledging that the applicability of a constitutional protection in a particular context depends on whether the language and purpose of the provision are implicated by the governmental action taken. "[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). In particular, the provisions of the Eighth Amendment are intended to curb governmental abuse of the power to punish, and that purpose is implicated where the government exercises that power, even if the exercise is cloaked in the form of sanctions labeled "civil" rather than "criminal."[9]

[9] Characterizing proceedings as "civil" or "criminal" for purposes of (continued...)

The Court recently applied this principle in *United States v. Halper*, 490 U.S. 435, when the Court addressed the constitutional protection against "multiple punishments for the same offense." *Id.* at 440. The question in that case was whether a "statutory penalty authorized by the civil False Claims Act . . . constitutes a second 'punishment' for the purpose of double jeopardy analysis." *Id.* at 441. In *Halper*, as here, the government argued that the constitutional provision at issue limited its protection to *criminal* punishments. The Court, however, emphasized that "[t]he notion of punishment, as we commonly understand it, cuts across the division between civil and criminal law . . . ." *Id.* at 447-48. Thus, "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 448.

Here, as in *Halper*, the question is whether the forfeiture of Austin's property, as applied to him, "serves the goals of punishment," rather than a remedial function. We have demonstrated above that it does. Accordingly, the fact that it has been applied in an action that is civil in form does not control the applicability of the Eighth Amendment. The forfeiture constituted punishment, and it may therefore not be cruel or unusual; as

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[9] (...continued)
those procedural provisions of the Bill of Rights that expressly or implicitly apply *only* in criminal proceedings is a difficult process. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The issue before the Court in this case is not whether civil forfeiture proceedings are "criminal" for purposes of these procedural provisions, but simply whether, even assuming the proceedings are properly denominated "civil" and conducted according to civil procedures and standards of proof, the result of the process constitutes a "punishment" subject to the standards of the Eighth Amendment.

a financial punishment it is a fine, and therefore may not be excessive.

In opposing the grant of *certiorari*, the government nevertheless relies on two cases in which this Court has rejected arguments that the Eighth Amendment applied in particular civil contexts. Op.Cert. at 4-5. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, the Court held that the Excessive Fines Clause did not apply to an award of punitive damages in a civil case between two private parties. And in *Ingraham v. Wright*, 430 U.S. 651, the Court concluded that the Cruel and Unusual Punishments Clause did not govern the administration of corporal punishment to public school students. Neither case, however, can fairly be read to make the application of fundamental rights turn on the label applied to a form of procedure, and both are factually distinguishable.

In *Ingraham*, the Court looked first to the language and history of the Eighth Amendment. Acknowledging that the language of the Amendment is not limited to criminal cases and, indeed, that a reference to "criminal cases" was actually omitted from an early draft of the English Bill of Rights of 1689 from which it derives, 430 U.S. at 664-65, the Court nevertheless emphasized that the three subjects with which the Amendment is concerned -- bail, fines and punishment -- are traditionally associated with the criminal justice process. The Court found this linkage suggestive that the Amendment was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," and that the prohibition on cruel and unusual punishments was therefore "designed to protect those convicted of crimes." *Id.* at 664.

But the factual context of *Ingraham* belies any effort to read the case as drawing an absolute line based on procedural form. The Court's concern in *Ingraham* was to distinguish the punishment of criminals from the pun-

ishment of schoolchildren. The Bill of Rights is largely designed to protect unpopular minorities from possible excesses of the majority, and its many protections for criminal defendants reflect the wise concern that those accused or convicted of violations of society's fundamental rules are especially likely to be victimized by public revulsion for their acts. As the Court recognized in *Ingraham*, the Eighth Amendment in particular was rooted in the concern that zeal for the punishment of crimes not lead to legislative excess. 430 U.S. at 664-65.

In the majority's view, this core purpose of the Bill of Rights was not implicated in *Ingraham*. According to the Court, "[t]he schoolchild has little need for the protection of the Eighth Amendment," unlike someone accused of crime. *Id.* at 670.[10] The Court's emphasis on the link between the Amendment and criminal matters was thus functional, not formal. Indeed, the Court expressly recognized that its concern was not with labels: "Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Id.* at 669 n.37; *see also Browning-Ferris*, 492 U.S. at 263 n.3.

No one could contend, however, that a person accused of sale of cocaine "has little need for the protection of the Eighth Amendment." Nor is it easy to imagine a form of action more "analogous to criminal punishments" than the civil forfeiture provided for violation of the narcotics laws, which were created and are maintained to further the purposes of the criminal laws. Indeed, the federal forfeiture program is administered by the very officials "entrusted with the criminal-law function of government" whose power the Court saw the Eighth Amendment as designed to limit. Thus, the con-

[10] *But cf. Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

cerns that led the *Ingraham* majority to classify corporal punishment of schoolchildren as outside the ambit of the Eighth Amendment are hardly relevant to civil narcotics forfeiture.

The same emphasis on substantive reality is reflected in *Browning-Ferris*. There, the Court considered whether punitive damages assessed by a jury in a civil antitrust action between two corporations implicated the Excessive Fines Clause. Once again, the Court's general formulations noted that the Amendment applies "primarily, and perhaps exclusively, to criminal prosecutions and punishments." 492 U.S. at 262. But the Court explicitly limited its ruling to the factual context before it. The Court expressly declined to "go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Id.* at 263. Moreover, the *Browning-Ferris* Court recalled that *Ingraham* had "left open . . . the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases," and pointed out that the Bail Clause of the Amendment was implicated "when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding." 492 U.S. at 263 n.3, citing *Carlson v. Landon*, 342 U.S. 524 (1952). Like *Ingraham*, *Browning-Ferris* thus serves clear notice that in stressing the Eighth Amendment's purpose to protect those who are subject to the government's criminal justice power, the Court is concerned not with labels but with substance.

The facts of *Browning-Ferris* are also far removed from this case. *Browning-Ferris* dealt with an award of punitive damages by a jury in a lawsuit brought by a private party. Both the language and the history of the Amendment point against its application to such damages. As the Court pointed out, "at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." 492 U.S. at 265. More-

over, to the extent that the Amendment was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," *Ingraham*, 430 U.S. at 664, the result in *Browning-Ferris* is a logical one. The framers of the Amendment feared "the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris*, 492 U.S. at 266. Kelco Disposal, Inc. (the plaintiff in *Browning-Ferris*) does not wield that power.

By contrast, the present case plainly involves "a payment to a sovereign," and not to a private plaintiff. The language of the Amendment thus *favors* its application here. As all members of the Court acknowledged in *Browning-Ferris*, courts have long recognized that the word "fine" can apply to "money, recovered in a civil suit, which was paid to the government." *Id.* at 265 n.7, citing *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858), and *Gosselink v. Campbell*, 4 Iowa 296 (1856). See also 492 U.S. at 295 (O'Connor, J., concurring in part and dissenting in part).

More importantly, this case differs from *Browning-Ferris*, as it does from *Ingraham*, in involving the exercise of punitive power not by private parties and jurors, but by the very prosecutorial powers that the Eighth Amendment was intended to control. The Court in *Browning-Ferris* was careful to limit its holding to cases brought by private parties. "Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 492 U.S. at 275. By contrast, that is exactly what the government *has* done in this case.

C. The Eighth Amendment Is Not Inapplicable Because The Action Is Styled An *In Rem* Forfeiture

The government additionally argues that even if the Eighth Amendment applies in some civil contexts, it should not be held to apply to civil forfeitures because the purpose of such forfeitures is "remedial." Op.Cert. at 4. In fact, however, a consideration of the nature, purposes, and applications of the civil forfeiture statute at issue in this case compels the conclusion that proceedings under that statute are exactly the sort of punitive civil action to which the provisions of the Eighth Amendment ought to apply.

Far from being uniquely remedial, forfeitures are the closest to criminal punishments of all civil remedies. This Court long ago recognized that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U.S. at 634. As recently as 1965, this Court cited *Boyd* with approval on this very point, noting that a forfeiture proceeding is at least "quasi-criminal in character." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

Like criminal actions, forfeiture proceedings are brought in the name of the state to enforce provisions of the criminal laws. Unlike punitive damages, or various civil fines provided for in various regulatory schemes, the narcotics forfeitures mandated by 21 U.S.C. §881 all require as a prerequisite the occurrence of a criminal "violation of this subchapter." 21 U.S.C. §881(a). As this Court has acknowledged, the forfeiture of property used "in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo v. Pearson Yacht Leasing*

Co., 416 U.S. at 687.[11] As demonstrated above, the legislative history of the very forfeiture provision at issue in this case demonstrates that narcotics forfeitures under §881 were perceived by Congress as interchangeable with criminal *in personam* forfeiture and thus as a "powerful deterrent" to the commission of drug offenses -- in other words, as a punishment. S. Rep. 98-223 at 195, 4 U.S. Code Cong. & Admin. News at 3378.

Despite the many reasons for characterizing forfeitures under §881 as punishments that are limited by the Eighth Amendment, the government will no doubt rely on the historical distinction between *in personam* and *in rem* forfeitures. *In personam* forfeitures, such as those attendant on violations of the RICO statute, *see* 18 U.S.C. §1963, are explicitly designated as punishments for crime.[12] They are imposed on a defendant as part of a judgment in a criminal case, after guilt has been proved beyond a reasonable doubt, and they require the defendant, and only the defendant, to yield his or her interest in the disputed property.[13] *In rem* forfeitures, by

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[11] While emphasizing the use of forfeiture laws as an adjunct to criminal sanctions, the Court in *Calero-Toledo* relegated the ostensibly "remedial" purposes that forfeiture laws "also" serve -- "compensat[ing] the Government for its enforcement efforts and provid[ing] methods for obtaining security for subsequently imposed penalties and fines" -- to a footnote. *Id.* at 687-88 n.26.

[12] The government concedes that criminal *in personam* forfeitures, such as those imposed by RICO, 18 U.S.C. §1963, are limited by the Eighth Amendment. Op.Cert. at 6 n.1. *See also United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

[13] Such forfeitures have been rare in American law. From the abolition of forfeiture of estates by the first Congress in 1790, Act of April 30, 1790, 1 Stat. 117, until the adoption of RICO in 1970, 18 U.S.C. §1963, *in personam* forfeitures of this type were unknown to federal law. *See* Note, "The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Court's to Realize RICO's Potential," 33 Am.U.L.Rev. 747, 754 n.50 (1984).

contrast, are ostensibly civil actions against the property itself. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827). They follow an action which is civil in form, rules of procedure and burden of proof, in which no defendant is specifically found guilty of a crime, and they extinguish the title of any person or entity other than the government to the property in question. *In rem* forfeitures are frequently said to be based on a legal fiction in which the property itself is held to be guilty of a crime. *Id.*[14]

Legal fiction, however, is not a sound basis for the application of constitutional principle.[15] It insults the framers, as well as contemporary values, to attribute to the Constitution the proposition that depriving an owner of his entire property as a result of his violation of the narcotics laws does not constitute punishment, because it is the property itself and not the owner who is treated as the guilty party under the relevant form of action.

Nor can it be claimed that the purpose of civil for-

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[14] This fiction is often traced back to the common law principle of deodands, which held an inanimate object involved in a fatal accident forfeit to the Crown, or even biblical injunctions requiring punishment of animals that caused the death of humans. *Exodus* 21:28-30. *See* Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," 46 Temp. L.Q. 169 (1973). *See also* Palm, "RICO Forfeiture and the Eighth Amendment: When is Everything Too Much," 53 U. Pitt. L.Rev. 1, 6-13 (1991).

[15] In the jurisdictional context, this Court has ruled that the ancient fictions upon which the distinction between *in personam* and *in rem* actions rest do not justify exempting actions *in rem* from the constitutional standards of fairness imposed on *in personam* actions. "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." *Shaffer v. Heitner*, 433 U.S. at 212.

feitures is primarily or exclusively remedial, such that its punitive purposes and effects are somehow submerged in a scheme that provides "rough" remedial justice. *Cf. United States v. Halper*, 490 U.S. at 446. Unlike the "liquidated damages" penalty of the False Claims Act, narcotics civil forfeitures do not substitute for damage remedies, and compensate no victim of crime. Like other fines and punishments, they inure to the public treasury, where they are used for law enforcement purposes.[16]

This is not to say that civil forfeiture serves no remedial ends, and is purely criminal in nature. As this Court held in *Halper*, "[i]t is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id* at 447. For example, forfeiture of contraband, or of the instrumentalities of crime, will often have the remedial purpose of removing dangerous items from circulation. Narcotics, weapons and burglar tools may be declared forfeit when they are used in the commission of a crime, not simply as a supplement to fines or imprisonment, but because such items are dangerous, at least in the hands of those who have abused them. Moreover, the punitive component of such forfeitures is minimal, given the relatively low legitimate value of such items.

The extension of this principle to more valuable

[16] The Comprehensive Forfeiture Act of 1984 provides that such forfeitures no longer become part of the general Treasury, but instead become part of a special Assets Forfeiture Fund within the Treasury, and permits the transfer of a portion of the value of forfeited assets to state and local law enforcement agencies. Pub. L.No. 98-473, §§309-310, codified at 21 U.S.C. §881(e)(1)(A) and 28 U.S.C. §524(c). The fact that the law enforcement agencies who enforce the criminal forfeiture laws obtain direct financial benefit from doing so enhances the very potential for abuse that the Eighth Amendment is designed to control. *See* below at note 20. *See also Harmelin v. Michigan*, _ U.S. __, 111 S.Ct. 2680, 2693 n.9 (1991)(opinion of Scalia, J.).

property, such as vehicles and boats, is more problematic, however, and its application to real estate stretches the remedial rationale to the breaking point. We do not really believe that someone who has transported narcotics in a vehicle or hidden them in a house or barn has rendered the property so dangerous that it must be surrendered to the government for the sake of public safety. Since the value of such property bears no reasonable or necessary relation to the seriousness of the offense, the notion that any remedial purpose is being served becomes more remote. It seems clear that the primary purpose of such laws, as this Court recognized in *Calero-Toledo*, is to "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 687.

To recognize that the remedial justification of *in rem* forfeitures is largely fictional, of course, does not render such statutes unconstitutional. Taking the vehicle of a drug dealer may be an entirely appropriate portion of a punishment that may also include imprisonment and other financial sanctions. But it is nevertheless a punishment, and therefore subject to the constitutional principles that limit the degree of punishment that may be imposed by a civilized society. Just as the imposition of life imprisonment for possession of a single marijuana cigarette would be cruel and arbitrary, *cf. Solem v. Helm*, 463 U.S. 277, so might a fine or forfeiture equal to a person's entire possessions be constitutionally excessive.

D. The Application Of The Eighth Amendment To Civil *In Rem* Forfeitures Is Not Inconsistent With This Court's Cases

It may be argued, finally, that a number of decisions of this Court rejecting various attacks on *in rem* forfeiture under a variety of statutes somehow foreclose the

issue presented in this case. If forfeiture may constitutionally be applied against an owner who is guilty of no offense at all, *see, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, it may be asked, how can the forfeiture of the property of an admitted offender violate the Constitution? Any such argument, however, would misperceive petitioner's claim in this case, the nature of this Court's forfeiture decisions, and the implications of this Court's prior decisions under the Eighth Amendment.

At a fundamental level, petitioner's argument cannot be foreclosed by any prior decision of the Court, since it presents a question of first impression. While the Court has dealt with a variety of constitutional and statutory issues arising under various forfeiture statutes, this Court has never considered whether any civil forfeiture violated the Cruel and Unusual Punishments or Excessive Fines Clause. Indeed, as discussed above, the Court has never addressed the substance of the Excessive Fines Clause at all. Holdings that particular applications of various forfeiture statutes do not violate other constitutional provisions have no bearing on that issue.

Moreover, petitioner does not argue that the Eighth Amendment prohibits civil *in rem* forfeitures, as applied to those guilty of crime or to those innocent of criminal wrongdoing. His argument is merely that any such forfeiture must be weighed against the nature of his offense. The Eighth Amendment does not prohibit punishment, only punishment that exceeds what a civilized society would regard as proportionate to the offense. That the Court has sustained forfeitures in the past -- without considering the Eighth Amendment at all -- does not preclude the possibility that some future punishment may be found to be excessive.

Nor can it be argued that the Court's long acceptance of the fictional nature of the civil *in rem* forfeiture, *see e.g., The Palmyra*, 25 U.S. at 14, somehow precludes

recognition of its punitive quality.[17] As early as *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921), the Court acknowledged the "formidable" argument that, in enacting a forfeiture statute, "Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner, who was without guilt" and that, if the statute was interpreted to apply to innocent owners, "it seems to violate that justice which should be the foundation of the due process of law required by the Constitution." Though the Court concluded that the long history of forfeiture law required rejection of that argument, it did not purport to decide, in that or any other case, that forfeitures were exempt from challenge under other constitutional provisions, that an *in rem* forfeiture could never be of a magnitude so disproportionate to the fault (or lack of fault) of an owner as to be constitutionally excessive, or that the Court must ignore in all contexts the punitive purposes and effects of particular forfeiture programs.

Calero-Toledo, in particular, does not stand in opposition to petitioner's argument. Like the earlier civil forfeiture decisions of this Court, it does not address the applicability of the Eighth Amendment. Nor does it pur-

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[17] Commentators have been caustic in noting the "anachronistic" nature of the personification fiction at the heart of the *in rem* forfeiture. The doctrine has been described as a "legal curiosity," "repugnant," a "perversion," and "superstitious." *See* Note, *supra* n.5, at 918-19 & nn.34-39 (collecting sources). Law review commentators have universally called for application of the Eighth Amendment to civil forfeitures under §881. *See, e.g.*, Note, "Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation," 60 Geo. Wash. L.Rev. 194 (1991); Note, "Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment," 89 Mich.L.Rev. 165 (1990); Note, "Fear and Loathing and the Forfeiture Laws," 75 Cornell L.Rev. 1151, 1175-78 (1990); Note, "Shouldn't the Punishment Fit the Crime," 55 Brooklyn L.Rev. 417 (1989).

port to find such forfeitures "remedial" -- on the contrary, it emphasizes that narcotics-related forfeiture statutes advance "the same purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." 416 U.S. at 687. Of course, these purposes -- incapacitation and deterrence by making crime unprofitable -- are two of the defining purposes of punishment.

Nor does *Calero-Toledo* accept some basis of strict liability that is incompatible with the idea of punishment. The apparently unjust imposition of sanctions on the yacht owners in *Calero-Toledo*, who were innocent of criminal intent, and perhaps even of negligence in the ordinary understanding, is not confined to some "remedial" civil procedure, but has been imposed in confessedly criminal contexts as well. *See, e.g., United States v. Dotterweich*, 320 U.S. 277 (1943). Whether the punishment is denominated civil, as in *Calero-Toledo*, or criminal, as in *Dotterweich*, the Court has recognized that the public welfare occasionally requires the imposition of sanctions on persons who lack criminal intent or moral blameworthiness. In such cases, the Court has allowed punishment on a strict liability basis, in effect putting the burden on those "in responsible relation" to property or an enterprise to prevent harm from its operation or use.[18]

But the Court's long acceptance, as a matter of statutory interpretation and against due process arguments, that property may be forfeited *in rem* even where a party with an interest in the property is not blameworthy, is

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[18] Significantly, however, *Calero-Toledo* does not permit the imposition of *in rem* forfeiture, any more than the criminal strict liability cases permit the imposition of criminal punishment, on those who had no ability to avoid the harm the law seeks to prevent. *See also United States v. 92 Buena Visa Avenue*, No. 91-781, __ U.S. __ (Feb. 24, 1993).

not in itself at odds with the Court's Eighth Amendment jurisprudence. Certainly, nothing in the Court's past decisions forecloses a holding in this case that excessive and disproportionate financial punishments violate the Eighth Amendment, whether imposed after a civil proceeding or after a criminal one.

II. THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR A DETERMINATION WHETHER THE FORFEITURE IN THIS CASE CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT OR AN EXCESSIVE FINE

In opposing the grant of the writ of *certiorari*, the United States argued that the punishment imposed in this case would be surely upheld even if subjected to Eighth Amendment scrutiny. Citing *Harmelin v. Michigan*, 111 S.Ct. 2680, and the severe penalties made applicable to various drug offenses by the laws of the United States and the several states, the government contended that a financial exaction of $38,000 as a fine for the sale of a small quantity of cocaine could not be viewed as constitutionally disproportionate. Op.Cert. at 7-8. Whether or not the government is correct should be determined in the first instance by the court of appeals.

Because the court of appeals believed that the Eighth Amendment had no application to this case, it had no occasion to address the merits of Austin's claim that the Amendment had been violated. It is the ordinary practice of this Court not to address questions that have not first been addressed in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. at 1534; *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552 n.3 (1990); *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971).

That practice should be followed in this case. Although the government contends that the relatively modest dollar value of Austin's property makes this an easy case, the Eighth Amendment question here should not be resolved so casually. The determination involves legal questions that this Court has never addressed, on which full briefing and the careful attention of a lower court would be helpful. And the ultimate resolution of the issue must necessarily turn on the particular facts of this case, which the court of appeals has never weighed against an Eighth Amendment challenge.

The government essentially argues that since American statutes commonly permit punishment of offenses like Austin's by significant terms of imprisonment, and fines well in excess of the value of Austin's home and business, the punishment inflicted on Austin cannot have been constitutionally disproportionate. Indeed, this Court in *Harmelin* held that life imprisonment for the sale of 672 grams of cocaine -- an amount of a different order of magnitude than the two grams at issue in this case -- was not constitutionally disproportionate. How, then, the government asks, can a financial exaction of only $38,000 be cruel and unusual?

The short answer is that the instant case raises issues different from those in *Harmelin*. Because the sanction in this case is essentially financial, it implicates the Excessive Fines Clause of the Amendment. Unlike the Cruel and Unusual Punishments Clause, the requirements of the Excessive Fines Clause have been subjected to little or no analysis by this Court. Indeed, as the Court pointed out in *Browning-Ferris*, 492 U.S. 257, the Court had "*never* considered an application of the Excessive Fines Clause" before that case was decided. *Id.* at 263 (emphasis added). And because the Court decided that the Clause had no application to punitive damages, the Court had no occasion even there to consider the meaning and extent of the Clause where it does apply.

Nor is the meaning of the Clause necessarily congruent with the Cruel and Unusual Punishments Clause. Justice Scalia's argument that the latter Clause contains no proportionality requirement at all rests heavily on its specific wording, *Harmelin*, 111 S.Ct. at 2687, and on the specific history of the phrase "cruel and unusual" in prior English and American constitutional texts. *Id.* at 2686-96. Indeed, his linguistic argument against proportionality rests in part on the specific argument that these texts "did not explicitly prohibit 'disproportionate' or '*excessive*' punishments." *Id.* at 2687 (emphasis added). But the wording of the Excessive Fines Clause seems directly to address the issue of proportionality, since the word itself "suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed." *Id.* at 2709 (opinion of White, J.).[19]

Moreover, although a majority of the Court in *Harmelin* did not find that the Cruel and Unusual Punishments Clause invalidated the life prison sentence there because of its mandatory nature, it is by no means clear what role should be played in the proportionality inquiry under the Excessive Fines Clause by the special procedural aspects of civil forfeiture. In its death penalty jurisprudence, the Court has repeatedly found both excessive discretion and unmitigated mandatory sentencing to raise troubling Eighth Amendment problems. The

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[19] The Court's analysis of the Excessive Bail Clause, which uses the same word as part of the same sentence as the Excessive Fines Clause, seems to recognize that the word inevitably implies that bail is excessive when there is a lack of proportion between the amount of bail and the purposes for which the bail is set. *Stack v. Boyle*, 342 U.S. 1 (1951). As the Court held in *United States v. Salerno*, 481 U.S. 739, 754 (1987), "to determine whether the government's response [in setting conditions of release or detention] is excessive, we must compare that response against the interest the government seeks to protect by means of that response." In other words, "excessive" bail is that which is disproportionate.

death penalty cases also teach that the Eighth Amendment is not blind to requirements of sound procedure in the administration of severe penalties. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

This interplay between questions of proportionality and procedure should not be surprising. A constitutional provision that was "intend[ed] to limit the power of those entrusted with the criminal-law function of government," *Ingraham*, 430 U.S. at 664, and to address "the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris*, 492 U.S. at 266, is hardly consistent with penalty schemes that sweep so broadly as to allow hardly any defense, apply mandatorily without mitigating factors or judicial discretion, and relegate applications for mercy entirely to the discretion not only of prosecutors, but of prosecutors with an institutional financial stake in the penalty at issue.[20] *Cf. Connally v. Georgia*, 429 U.S. 245 (1977)(invalidating system of search warrant applications to magistrate with financial stake in issuing warrants).

The forfeiture scheme at issue in this case has precisely these features. Their importance under the Excessive Fines Clause should not be addressed by this Court in the first instance without an opportunity for lower courts to develop the law. Contrary to the government's view, little purpose would be served by having this Court attempt to determine whether a particular forfeiture violates those standards, in the first instance, in a case of first impression, in an area in which the Court has been deeply divided.[21]

Finally, the financial exactions involved in this case differ in one other significant way from the punishments of death and imprisonment with which the Court's cases under the Cruel and Unusual Punishments Clause have dealt. While every person no doubt places a different value on his or her liberty, and indeed on life itself, the deprivation of life or liberty is sufficiently overpowering that a punishment of death or imprisonment for a substantial term of years can be evaluated for proportionality without reference to the specifics of the punishment's impact on the particular defendant involved. Whether death is a constitutionally disproportionate penalty for rape, *Coker v. Georgia*, 433 U.S. 584 (1977), or life imprisonment for a series of minor felonies, *Solem v. Helm*, 463 U.S. 277; *Rummel v. Estelle*, 445 U.S. 263 (1980), does not depend on any factor unique to the defendants in those cases.

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[20] As noted above, under the forfeiture scheme at issue here the forfeiture benefits not merely the Treasury generally but the very law enforcement authorities who decide when to seek forfeiture. *See* note 16 above, citing 21 U.S.C. §881(e)(1)(A) and 28 U.S.C. §524(c). The special potential for abuse inherent in financial sanctions was recognized even by those Justices who entirely rejected proportionality analysis in *Harmelin*: "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue." 111 S.Ct. at 2693 n.9 (Scalia, J.). The revenue enhancing incentive of the forfeiture punishment is even more severe here, because the officials who decide whether to seek forfeiture have a more direct stake in funds that will benefit their agencies than in general government revenues.

[21] In *Harmelin*, the Court was unable to muster a majority for any single method of proportionality analysis, and the Court therefore remains unlikely to provide any useful guidance to the lower courts on that subject. Two Justices concluded that the Eighth Amendment does not require that penalties be proportioned to the seriousness of the offense. 111 S.Ct. at 2684-2701 (Scalia, J.). While seven members of the Court rejected this view, those Justices divided sharply over the proper approach. A plurality of four adhered to the three-factor test of *Solem*. 111 S.Ct. at 2714-19 (White, J.); *id.* at 2719 (Marshall, J.). The remaining three Justices, however, took a radically different approach to the role of two of those factors. *Id.* at 2705-07 (Kennedy, J.).

Financial penalties are crucially different. In the language of economists, money has a declining marginal utility. To a millionaire, a $38,000 fine may well be a modest imposition, hardly to be compared with even a short term of imprisonment; to petitioner in this case, it represents a loss of his home and his livelihood -- perhaps, indeed, of his entire property in the world.[22] In recognition of that fact, sentencing schemes typically require judges imposing financial penalties to consider the wealth of the defendant before determining the amount of the fine.[23]

The government's suggestion that this is an easy case rests on the abstract calculation that, if a substantial jail term is not disproportionate for the offense, a financial penalty of less than $40,000 can hardly be unconstitutional. But if the magnitude and hence the potential excessiveness of a fine is to be measured not in absolute terms, but relative to the wealth of the offender, the question appears in a different light. Is the confiscation of a person's entire estate a proportionate punishment for the sale of two grams of cocaine? The framers who outlawed the traditional penalty of "corruption of

[22] From the fact that petitioner has been allowed to proceed *in forma pauperis*, it is evident that his resources are meager. The courts below had no occasion to make findings on the proportion of his entire assets that the forfeiture represented, but the record permits the inference that the forfeiture confiscated all or nearly all that he owned.

[23] For example, a court imposing a fine is required to consider, in addition to the usual factors relevant to sentencing, "the defendant's income, earning capacity, and financial resources," 18 U.S.C. §3572 (a)(1), and "the burden that the fine will impose on the defendant and [his dependents]." 18 U.S.C. §3572(a)(2). *See also* Sentencing Guidelines §5E1.2(d)(requiring courts to consider similar factors).

blood,"[24] and rejected forfeiture of estates at about the same time that the Eighth Amendment was drafted[25] presumably would not have thought so.

The Eighth Circuit in this case had no occasion to address the merits of petitioner's claim that the forfeiture in this case was disproportionate and excessive because, in its view, the relevant Clauses of the Eighth Amendment were simply inapplicable. Once this Court has held, as it should, that the Amendment does apply, it will have answered the significant question, and settled the conflict among the circuits, that justified review by this Court. No purpose would be served by addressing abstract issues regarding the meaning of those Clauses, or the particulars of petitioner's own case. The prudent and proper course is to remand to the court below for a determination whether the forfeiture here was consistent with the applicable Clauses of the Eighth Amendment.

[24] *See* Art. III, §3, cl.2. The penalty of corruption of blood divested convicted felons of all property and rights of station.

[25] Act of April 30, 1790, ch. 9, §24, 1 Stat. 117 (1790).

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded to the court of appeals.

Respectfully submitted,

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